No. 80-1688

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

LAMARR BADONI, ET AL., PETITIONERS

v.

ROBERT BROADBENT, COMMISSIONER, WATER AND POWER RESOURCES SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the federal management of Rainbow Bridge National Monument violates petitioners' rights under the Free Exercise Clause of the First Amendment when the government has not denied or restricted petitioners' opportunity to conduct religious ceremonies at the Monument.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Abington School Dist. v. *Schempp*, 374 U.S. 203 7

Cantwell v. *Connecticut*, 310 U.S. 296 6

Environmental Defense Fund v. *Higginson*, No. 80-1123 (D.C. Cir. May 15, 1981) 4

Fowler v. *Rhode Island*, 345 U.S. 67 6

Niemotko v. *Maryland*, 340 U.S. 268 6

O'Hair v. *Andrus*, 613 F. 2d 931 6

Presbyterian Church v. *Hull Church*, 393 U.S. 440 7

Sequoyah v. *Tennessee Valley Authority*, 620 F. 2d 1159, cert. denied, No. 80-284 (Nov. 3, 1980) 6

Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 6

Utah v. *Andrus*, 636 F. 2d 276 4

Wisconsin v. *Yoder*, 406 U.S. 205 8

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Page

Constitution, treaties, statutes and regulation:

United States Constitution, First Amendment 3, 5, 6, 7, 9

Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922 8

Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667 2

Act of Mar. 1, 1933, ch. 160, 47 Stat. 1418 ..... 2, 8

Act of Sept. 2, 1958, Pub. L. No. 85-868, 72 Stat. 1686 8

Act of Oct. 27, 1972, Pub. L. No. 92-593, 86 Stat. 1311, 16 U.S.C. 460dd *et seq.* 2

American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. (Supp. III) 1996 9

Colorado River Storage Project Act of 1956, ch. 203, 70 Stat. 105 ..... 2, 3

Section 1, 70 Stat. 105 4

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.* 3

Pres. Proc. of May 30, 1910, 36 Stat. 2703 2

16 U.S.C. 1 *et seq.* 2, 8

16 U.S.C. 431 8

36 C.F.R. 2.21 6

Page

Miscellaneous:

H.R. Conf. Rep. No. 1136, 64th Cong., 1st Sess. (1916) 8

H.R. Rep. No. 700, 64th Cong., 1st Sess. (1916) 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A36-A66) is reported at 638 F. 2d 172. The opinion of the district court (Pet. App. A1-A35) is reported at 455 F. Supp. 641.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1980. A timely petition for rehearing was denied on December 19, 1980. The petition for a writ of certiorari was filed on March 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the management of the Rainbow Bridge National Monument, a 160-acre parcel reserved for scientific and historical purposes by the Pres. Proc. of May 30, 1910, 36 Stat. 2703, which is located near the Navajo Reservation.[1] Rainbow Bridge is a large natural sandstone arch 309 feet high with a span of 278 feet. Glen Canyon Dam is a 710-foot high structure located on the Colorado River, 58 miles below the Rainbow Bridge National Monument. Construction of the dam, authorized by the Colorado River Storage Project Act of 1956, ch. 203, 70 Stat. 105, was completed in 1963, and a reservoir behind the dam, known as Lake Powell, began to fill. By 1977, Lake Powell had reached a depth of 20.9 feet directly under Rainbow Bridge, and if the lake fills to its maximum capacity, water will stand at a depth of 46 feet beneath Rainbow Bridge. The federal lands adjacent to Lake Powell, other than the land within the confines of the Rainbow Bridge National Monument, are administered by the National Park Service as the Glen Canyon National Recreation Area. Act of Oct. 27, 1972, Pub. L. No. 92-593, 86 Stat. 1311, 16 U.S.C. 460dd *et seq.* (Pet. App. A37-A39).

Prior to the creation of Lake Powell, Rainbow Bridge National Monument was fairly isolated and was visited by only a small number of tourists. Lake Powell, however, provides convenient water-borne access to the Monument, which has caused a significant increase in tourist traffic. Visitors to the Rainbow Bridge National Monument are subject to the regulation and control of the National Park Service. 16 U.S.C. 1 *et seq.* In addition, the Park Service

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[1]The land surrounding the Monument was not part of the original Navajo Reservation created by the Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667. This land was added to the Reservation by the Act of Mar. 1, 1933, ch. 160, 47 Stat. 1418, many years after the establishment of the Rainbow Bridge National Monument.

licenses commercial tour operators who provide water transport to the Monument and has granted a concession to a floating marina located near the Monument (Pet. App. A39-A40).[2]

2. Petitioners maintain that the Rainbow Bridge and its surroundings are a sacred site at which religious ceremonies must be performed occasionally. They brought this action for declaratory and injunctive relief against several officers of the Department of the Interior contending that the operation of the Glen Canyon Dam and the management of Rainbow Bridge National Monument unlawfully interfered with the free exercise of their religion in violation of the First Amendment.[3] First, they stated that the waters of Lake Powell had inundated sacred sites on Monument property. Second, petitioners claimed that the numbers and conduct of tourists visiting the Monument prevented them from conducting religious services. The complaint requested an injunction ordering the defendant officials " 'to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important religious and cultural interests of [petitioners] will not be harmed or degraded,' " and " 'to issue rules and regulations to take adequate measures preventing further desecration and destruction of the Rainbow Bridge area by tourists, and otherwise to take adequate measures to preclude impairment of the Rainbow Bridge National Monument' " (Pet. App. A49-A50).

The district court ruled that the public interest in operating Glen Canyon Dam and Lake Powell up to its intended capacity outweighed petitioners' claims under the Free

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[2]Establishment of this marina was specifically approved in a 1970 memorandum of understanding between the Department of the Interior and the Navajo Tribe.

[3]The complaint also alleged violations of the Colorado River Storage Project Act, *supra*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*

Exercise Clause to a lower water level (Pet. App. A20-A23). The court also noted that Rainbow Bridge National Monument had never been a part of the Navajo Reservation and ruled that the petitioners' lack of a property interest in the Monument was dispositive of their Free Exercise Clause claims (*id.* at A10-A11).[4]

The court of appeals affirmed on a different rationale than that adopted by the trial court. The court of appeals rejected the conclusion that petitioners' lack of a property interest in the Monument was determinative, finding that "[t]he government[] must manage its property in a manner that does not offend the Constitution" (Pet. App. A43). In the court's view, the question is whether the government

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[4]The district court also ruled against petitioners' claims concerning Section 1 of the Colorado River Storage Project Act, *supra* (Pet. App. A23-A25). With respect to the NEPA claim, the court held that the question whether the Interior Department was in violation of the statute was not yet ripe for judicial review because no administrative decision had been made on whether an Environmental Impact Statement (EIS) would be prepared on the operation of Glen Canyon Dam (*id.* at A29). In the alternative, the district court ruled that operation of the Dam is a ministerial act that is not subject to NEPA (*id.* at A30-A34).

The government stated on appeal that an administrative determination had been made not to prepare a site-specific EIS on the operation of Glen Canyon Dam. Instead, a policy decision had been reached to prepare a comprehensive, basin-wide EIS which, *inter alia*, would evaluate the operation of all the Water and Power Resources Service projects on the Colorado River and its tributaries. The court of appeals found these decisions to be reasonable and affirmed the rejection of petitioners' NEPA claims (Pet. App. A60-A66).

The comprehensive EIS proposed by Interior has been the subject of litigation. See *Environmental Defense Fund* v. *Higginson*, No. 80-1123 (D.C. Cir. May 15, 1981); *Utah* v. *Andrus*, 636 F. 2d 276 (10th Cir. 1980). Moreover, Congress has refused to appropriate funds for the preparation of the comprehensive EIS. In March 1981, the Interior Department decided against renewing efforts to obtain appropriations for preparation of the EIS. Notice of this policy decision has been sent to counsel for petitioners and to the court of appeals.

action creates a burden on the exercise of petitioner's religion and, if so, whether the government has established an interest of sufficient magnitude to outweigh the interest sought to be protected under the Free Exercise Clause (Pet. App. A44-A45).

The court first addressed petitioners' complaint that the water in Lake Powell has risen to a level that drowns a prayer spot and a spring sacred to petitioners. The court noted that uncontroverted evidence established that the storage capacity of the lake would be halved if the surface level were dropped to alleviate the alleged infringement, which would significantly reduce the water available for use in the Upper Colorado River Basin states. In these circumstances, the court of appeals concluded that the government interest must prevail (Pet. App. A46-A48).

Turning to petitioners' objections to the management of Rainbow Bridge National Monument by the Park Service, the court of appeals noted that petitioners' claim did not fall within the generally recognized categories of Free Exercise Clause violations because they alleged neither government compulsion to violate the tenets of their beliefs nor the conditioning of a benefit or a right on renunciation of a religious practice. Rather, the claim was grounded on actions of tourists at the Monument (Pet. App. A51-A52).

The court rejected this claim (Pet. App. A52-A56), finding that petitioners' attempt to compel the Park Service to exclude tourists from the Monument or to regulate their behavior in a certain manner sought "affirmative action by the government which implicates the Establishment Clause of the First Amendment" (*id.* at A52). In this connection, the court noted that the existing Park Service regulations concerning the behavior of visitors to the Monument satisfy many of petitioners' concerns, and that public assembly permits are available to petitioners for conducting religious ceremonies (*id.* at A57-A58).

ARGUMENT

Petitioners contend (Pet. 18-40) that the existing management of Rainbow Bridge National Monument by the National Park Service violates their constitutional right to free exercise of religion.[5] As the court of appeals suggested (Pet. App. A51-A52), petitioners' Free Exercise claims are most unusual in that they do not assert either that they have been denied access to the Monument or that government agents or regulations directly interfere with or impede their religious ceremonies. See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). Nor do petitioners claim that they are discriminated against by the Park Service. Public assembly permits are available for gatherings at the Monument (see 36 C.F.R. 2.21), and petitioners may apply for such permits when they desire special access to the Monument for religious purposes.[6] See, *e.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); see generally *O'Hair* v. *Andrus*, 613 F. 2d 931, 937 (D.C. Cir. 1979).

Petitioners' primary claim is that the Park Service management of the Monument infringes the free exercise of their religion because it allows other citizens to use the Monument for secular purposes. They object to the number

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[5]Petitioners appear to have abandoned in this Court their contention that maintenance of the present water level in Lake Powell violates their First Amendment rights. See Pet. 19 & n.11. In any event, this contention was correctly rejected below for the reasons stated by the court of appeals at Pet. App. A46-A48. See also *Sequoyah* v. *Tennessee Valley Authority*, 620 F. 2d 1159 (6th Cir.), cert. denied, No. 80-284 (Nov. 3, 1980).

[6]As the court of appeals noted (Pet. App. A58), religious ceremonies could be free of the inhibitions caused by the proximity of tourists if the ceremonies were held outside of normal visiting hours. The record does not indicate that petitioners have ever sought such a permit. Thus, petitioners' contention (Pet. 28) that the presence of tourists impairs their ability to perform religious ceremonies is not ripe for review by this Court. See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967).

and conduct of tourists who visit the Monument on the ground that the tourism results in a desecration of the sacred ground, and seek to compel the Park Service to restrict the rights of the public on this government property. This contention fails to allege any "coercive effect" on "the practice of the [Navajo] religion" (*Abington School Dist.* v. *Schempp*, 374 U.S. 203, 223 (1963)), and the court of appeals correctly held that the Free Exercise Clause does not require the Park Service to alter its regulation of public access to the Monument. See Pet. App. A56-A57.

Consideration of petitioners' claims by the lower courts was complicated by petitioners' failure to articulate the specific relief they felt was necessary to alleviate the First Amendment violation. The complaint asked for an injunction to require the officials to issue unspecified rules and regulations to protect their religious interests. Petitioners' memorandum in the district court merely suggested that unspecified "less drastic measures" than lowering the water level of Lake Powell might be available to satisfy their religious interests (Pet. 14-15 n.7). Finally, on appeal, petitioners claimed that they were attempting to establish their right to "some accommodation" and suggested some measures that might mitigate the claimed burden placed on the exercise of their religious beliefs by tourist use of the Monument. These suggestions, however, did not purport to be an exhaustive list of the changes petitioners desire. In these circumstances, contrary to petitioners' suggestion (Pet. 16), the court of appeals acted properly in focusing on the specific suggestions made by petitioners on appeal rather than speculating on other changes that could be made in the management of the Monument (Pet. App. A54-A59).[7]

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[7]For example, petitioners submit that the court of appeals should have considered all measures that would prohibit "sacrilegious activity" (Pet. 20), which would have left for the courts' determination matters of religious dogma that are outside their purview. Cf. *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 445-446 (1969).

Moreover, the court of appeals correctly stressed the interests that conflict with petitioners' desire to keep the Monument free from intrusions. Cf. *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972). Rainbow Bridge National Monument is government property declared to be an object "of historic or scientific interest * * *." 16 U.S.C. 431.[8] Congress has charged the Park Service with the duty to manage Parks and Monuments to provide for their enjoyment "by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. The interests of tourists and preservation are fundamental guides for the Park Service. See H.R. Rep. No. 700, 64th Cong., 1st Sess. 3 (1916); H.R. Conf. Rep. No. 1136, 64th Cong., 1st Sess. 2 (1916). Thus, the court of appeals correctly found that "the government has a strong interest in assuring public access to this natural wonder" (Pet. App. A52-A53). To elevate petitioners' religious interest in shielding the Monument from tourists over the public interest in access would convert the Monument into an area maintained by the government primarily for religious purposes, which would raise serious Establishment Clause problems.

Instead, the Park Service has been delegated the responsibility to manage Rainbow Bridge National Monument in

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[8]The land comprising the Monument has been the property of the United States since the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922. Although the area of the Monument, known as the Paiute Strip, was withdrawn briefly for Reservation purposes from 1884 to 1892, it was part of the public domain when the Monument was created in 1910. Land surrounding the 160-acre Monument was added to the Navajo Reservation by the Act of Mar. 1, 1933, ch. 160, 47 Stat. 1418. In 1958, Congress authorized an exchange of reservation lands contiguous to the Monument and Lake Powell for other federal lands. Act of Sept. 2, 1958, Pub. L. No. 85-868, 72 Stat. 1686. Thus, the Monument has never been part of the Navajo Reservation, and the United States has no trust responsibility to manage the Monument for the benefit of the Navajo Nation.

the public interest, which may require a balancing of competing policies. Of course, the Park Service may accommodate petitioners' religious needs to some extent without violating the Free Establishment Clause.[9] But the proper forum for that accommodation is an administrative one. Petitioners can apply for public assembly permits to conduct religious services, and they can seek changes in Park Service regulations. These measures may suffice to alleviate some, or all, of petitioners' concerns.[10] However, the First Amendment does not compel the Park Service to restrict public access to public property as petitioners request. The Free Exercise Clause is not violated simply because petitioners find offensive the manner in which tourists visit public sites that have religious significance for the Navajo.

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[9]Indeed, as petitioners note (Pet. 31-33), Congress has passed the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. (Supp. III) 1996, and other legislation concerning accommodation by federal agencies to the religious beliefs of Native Americans. There is no allegation that the Park Service management of Rainbow Bridge National Monument violates any of these statutes.

[10]For example, the Park Service is in the process of moving the floating marina of which petitioners have complained. Petitioners correctly note (Pet. 9) that the government erred in stating in the court of appeals that the marina had already been moved. However, the Park Service informs us that construction of a new marina, six miles away from the Monument, has begun. Completion of the new facility will depend on availability of funds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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